ties (1960) Ltd. v. *Raman & Ors.*[2] it was held among other things that

"as the defendants had been served with a writ which was itself a demand for possession, their tenancy at will had been terminated and by continuing to occupy the quarters they were trespassers;"

and in the course of his judgment at page 265 Ismail Khan J. (as he then was) referred to the judgment of Denning L.J. in *Martinali* v. *Ramuz & Anor.*[3] in which at page 893 His Lordship said:

"It is elementary that a tenancy at will is determined by a demand for possession, not by a notice to quit. These tenancies at will were determined by the issue of a writ claiming possession, which is itself a demand for possession."

In the event I give judgment for the plaintiff as prayed.

Judgment for the plaintiff.

Solicitors: *Dato' Bijaya & Co.; Wilson & Co.*

ISMAIL BIN HAJI EMBONG v. LAU KONG HAN

[G.C.J. (Ibrahim J.) June 16, 1970]

[Kuala Trengganu — Civil Action No. 69 of 1967]

Land Laws — Jual Janji — Transfer of land — Agreement for option to repurchase — Expiry of time — Whether time essence of contract — Contracts (Malay States) Ordinance, 1950, s. 56(1).

Bill of Sale — Transfer of house — Option of repurchase — Whether transfer a bill of sale — Void for non-registration — Bills of Sale Ordinance, 1950, s. 3.

Contract — Sale of land — Option to repurchase movable property — Whether time essence of contract.

The plaintiff had transferred certain land and a Malay-type house on it to one Lau Chee Hoi. An agreement giving an option to repurchase the land and house was entered into at the time when transfer was executed. Although the time for the exercise of the option to repurchase had expired, the plaintiff had been allowed to pay the interest agreed on the loan.

Held: (1) in this case the transactions were loan transactions in respect of the land and the house and in regard to the land it was a *jual janji;*

(2) although the time for the exercise of the option to repurchase had expired, time was not of the essence of the contract, as, even if time was originally of the essence of the contract it had been allowed to pass and the conduct of the parties clearly showed that it was no longer so;

(3) the plaintiff was therefore entitled to repurchase the land on payment of the sum of money lawfully due to the defendant;

(4) as regards the house, which must be regarded as a movable property, the transaction was a bill of sale and therefore void for want of registration; the plaintiff was therefore entitled to recover possession of the house.

Cases referred to:-

(1) *Kiah binte Hanapiah* v. *Som binte Hanapiah* [1953] M.L.J. 82.

(2) *Ponnusamy & Anor.* v. *Nathu Ram* (1959) 3 M.C. 260 at p. 272.

(3) *Wong See Leng* v. *C. Saraswathy Ammal* [1954] M.L.J. 141.

(4) *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.

(5) *Simpson* v. *Connolly* [1953] 2 All E.R. 474.

(6) *Jamshed Khodoram Irani* v. *Burjorji Dunjibhai* (1916) L.R. 43 I.A. 26.

(7) *S. Ayadurai* v. *Lim Hye* [1959] M.L.J. 143.

(8) *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245.

(9) *Wok binte Hussein* v. *Harchand Singh* [1953] M.L.J. 176.

(10) *Madell* v. *Thomas & Co.* [1891] 1 Q.B. 230.

CIVIL SUIT.

A. Wilson for the plaintiff.

Dato' Bijaya for the defendant.

Cur. Adv. Vult.

Ibrahim J.: The plaintiff's claim in this action is for: —

1. a declaration that the transfer of Lot No. 2434 Town of Kuala Trengganu then held under K.S.B. 1050 (now under Grant No. 3784) on March 24, 1962 from the plaintiff to Lau Chee Hai is null and void;

2. a declaration that the transfer of premises No. 732-A on the said Lot on July 28, 1959 from the plaintiff to Lau Chee Hai is null and void;

3. a declaration that the transfer of the said Lot No. 2434 from Lau Chee Hai to Lau Kong Han on May 2, 1963 is null and void;

4. a declaration that the transfer of the said premises No. 732-A on the said Lot from Lau Chee Hai to Lau Kong Han on May 2, 1963 is null and void;

5. an order that the plaintiff be registered as proprietor and owner of the said Lot No. 2434, Town of Kuala Trengganu under Grant No. 3784 and premises No. 732-A thereon;

6. costs; and

7. such further or other relief as the court deems fit.

The defendant contests the claim on the ground that the land and premises had been properly transferred to him by his father Lau Chee Hai on May 2, 1963 and on October 3, 1963 respectively and alleging that the plaintiff was a tenant of both the land and premises at $40 p.m. and was in arrears of rent from October 1965 to September 1967, and counterclaims for: —

a) the sum of $920.00,

b) vacant possession of the premises No: 732 Kampong Darat Nesan Empat, Kuala Trengganu from the plaintiff or anyone claiming through him,

c) costs, and

d) such further order as the court deems fit to grant.

According to the plaintiff (PW1) he in 1959 needed some money and approached a relative of his named Mohamed bin Haji Awang (PW2) to raise a loan for him. 3 to 4 days later PW2 told him that one Lau Chee Hai whom he knew had just received some gratuity on retirement and on an appointment made the 3 of them met at a coffee shop near the old court-house. He told Lau he wanted to borrow $2,000 and it was

agreed that interest at $40 p.m. was to be payable on the loan and that his land and house would be made securities therefor at $1,000 each. He suggested that they be charged to him but Lau did not agree to that and instead suggested that sale transactions be executed in respect of the land and house at $1,000 each and an agreement be made by which he could buy back the land and house by paying Lau $2,000 and the $40 monthly interest within 8 months. On July 12, 1959 he executed a deed of sale in respect of the house in the prescribed form (exh: P1) and on July 14, 1950 he executed a memorandum of transfer in respect of the land in favour of Lau Chee Hai. On the same day an agreement was also made between Lau and him for the purpose of enabling him to buy back the land and the house. PW2 prepared and witnessed the agreement.

He continues to stay in the house and collects the produce from the land. There are 2 other houses on the land and the 2 owners who are his relatives also continue to occupy them without paying anything to anybody.

The 8 months period mentioned in the agreement was to have expired in March, 1960. He could not raise the $2,000 then and together with PW2 he went to Lau's house and asked him to give him more time. Lau said it was all right for another 5 to 6 months on condition that he continued to pay the $40 monthly interest. At the expiry of the 5 to 6 months he still could not raise the $2,000 and he again went to see Lau about it. Lau said it was all right as long as he paid the $40 monthly. PW2 did not go with him this time.

Though the memorandum of transfer was executed on July 14, 1959 it was not registered until March 24, 1962. Another memorandum of transfer was executed in respect of the land, by Lau in favour of his son Lau Kong Han the defendant on May 2, 1963 and it was registered on the same day. Lau also transferred the house to the defendant on the same day. Lau had told him of his intention to transfer the land and house to the defendant before he did so on the ground that he was in poor health and had wanted to avoid payment of estate duty should he die. He had asked that an agreement be made with the defendant but Lau said it was not necessary as he had told the defendant everything and that the transfer to the defendant was without any consideration and that he was to continue paying the monthly $40 to him. He agreed. The defendant was not present then but Lau's wife and PW2 were present.

He paid the $40 monthly till October 1965 when he stopped because he wanted to redeem the land and to raise the money to do so. Lau died on December 12, 1966 and in February 1967 he went with PW2 to see Lau's widow, the defendant's mother. He told her he wanted to pay the $2,000 and arrears of interest and get back the land. She told him to come again when her son came back and he told her that he would come again in May 1967 and bring all the money to settle the matter. She agreed. A son of hers who was a police constable on Chinese New Year leave was present then. When he came and saw the defendant's mother with PW2 in May 1967 she told him to come again in 3 days' time when the defendant would come from Dungun. Three days later he again went with PW2 to her house. This time the defendant was present together with his mother. He told the defendant he wanted to repay the loan of $2,000 plus the $40 monthly interest still in arrears. He offered to pay $3,000 which was to include the arrears of monthly payments and whatever quit rents and assessment rates he had paid, but the defendant refused to accept the offer and asked for $6,000 instead, $2,000 being capital and $4,000 as profit. When he referred to the agreement with his father the defendant told him that he was not going to abide by it. He told him that he was offered $8,000 for the land and house.

He retained his present solicitors on May 28, 1970 and on August 28, 1967 his solicitors wrote to the defendant to recover the land and house.

PW1's evidence was corroborated by PW2 who was at the material time a clerk in the High Court, Kuala Trengganu. He was a good friend of Lau who in 1958 or early 1959 had retired as a Chinese interpreter in the magistrate's court, Kuala Trengganu.

Lau Kong Han, the defendant (DW1) in his evidence said that he got the land and the house in question from his father before his death on December 12, 1966. The land was transferred to him by his father on May 2, 1963 and the memorandum of transfer was presented for registration on the same day. The house which was on the land was also transferred to him on the same day. He paid $1,000 for the land and $1,000 for the house and the consideration mentioned in the memorandum of transfer includes consideration for both land and house.

He first knew of the existence of the agreement dated July 14, 1959 about 2 months after the memorandum of transfer had been executed by his father in his favour when his father handed it to him. His father also told him that he had not extended the time. His father had earlier told him that he had bought the land from the plaintiff. His father had never mentioned to him that the transfer was actually a charge or that the plaintiff had agreed to his transferring the land to him.

He considered $2,000 as fair price when he paid it in 1963 though he values the land and house at $7,000 now. He considered the rent at $40 a month as reasonable and these were collected by his mother until October, 1965. After the transfer to him his father sometimes signed the receipts for him sometimes he himself signed the receipts. He personally had sent a notice claiming arrears of rent on July 18, 1967 and this was the first correspondence between the parties. On September 6, 1967 his solicitors wrote to the plaintiff claiming the arrears of rent. On September 20, 1967 his solicitors gave the plaintiff notice to quit. The plaintiff has not vacated up to now.

In the pleadings the issues of fraud and misrepresentation were raised but in the course of the hearing these were abandoned by the plaintiff. It was also conceded by the plaintiff that the defendant's father had not been running a moneylending business and he

therefore also abandoned the allegation that the transaction was void under the Moneylenders Ordinance.

The plaintiff's evidence was fully corroborated by PW2 who impressed me as a very truthful witness. The defendant did not seem to have personally known much of what took place between the plaintiff and his father and he had not called his mother who appeared from the evidence to have considerable knowledge of what was going on to give evidence to rebut any of the plaintiff's assertions. After considering all the evidence before me and the circumstances of this case I accept the plaintiff's version of what took place, particularly that the transaction was in fact a loan transaction, that the defendant's father had agreed to extend the period of 8 months and that the defendant knew about these matters when the land and house were transferred to him by his father.

It is common ground that the premises in this action is a wooden Malay-type house raised on pillars placed on the ground and is therefore moveable property, for in *Kiah binte Hanapiah* v. *Som binte Hanapiah*,[1] it has been held that:

"it is well-established that houses of the Malay type resting on stilts and not buried into the earth are movable property:"

There were thus technically two loan transactions between the plaintiff and the defendant's father, *i.e.*, one in respect of the land and the other in respect of the house and the laws applicable to them are different.

Though it was in fact a loan transaction it is settled law that a transaction embodied in an executed memorandum of transfer in the form prescribed by the Land Enactment cannot be considered as anything else but an absolute sale of the land and that the option to repurchase confers only a contractual right on the plaintiff — it does not confer on him any interest in the land. In *Ponnusamy & Anor.* v. *Nathu Ram*[2] at page 272 Good J. in the course of his judgment said:

"In the present case, the parties executed a memorandum of transfer in the form in Schedule XX to the Land Code, in which the transaction was unequivocally described in terms that showed it to be an out-right sale of the property to R.M.N. Naina (deceased) by the defendant for the sum of $10,000.

It appears to me to be beyond doubt that a memorandum of transfer executed by the parties to a transaction under section 110 of the Land Code contains the terms of the contract reduced to the form of a document, and required by law to be so reduced; and the form in Schedule XX precludes the transaction from being treated as anything but an out-right sale. The words '...do hereby transfer to the said... all my right title and interest in the said land' prevent the use of the form for the purpose of effecting a conditional sale with a clause for repurchase on the happening of a stipulated event (e.g. a transaction of the kind recognised by the Judicial Committee in *Gyanagerji's* case). The Land Code does not recognise such transactions and provides, in Part X which deals with charges, an exclusive method of securing loans of money on land of which the borrower is the registered proprietor. If a memorandum of transfer is executed, then any separate oral agreement between the parties to the effect that the transaction is not as stated in the memorandum is an agreement the terms of which are inconsistent with the terms of the memorandum, and oral evidence of such an agreement is inadmissible."

In *Wong See Leng* v. *C. Saraswathy Ammal*[3] where at the hearing the plaintiff adopted the facts alleged in the defence that the lands were transferred to the defendant as security with the option to re-purchase within a certain time and asked for judgment for an order for the re-transfer of the said lands on the ground that the principle "once a mortgage always a mortgage" should be applied it was held that:

"following *Haji Abdul Rahman* v. *Mohamed Hassan*[4] the English principles dealing with clogs on the equity of redemption do not apply to a system of registration of titles to land. The option given to the plaintiff to repurchase the land did not confer on her any interest in the land; she only acquired a contractual right and since time was made the essence of the contract she has forfeited that right."

Buhagiar J. in the course of his judgment at page 143 said:

"The option given to the respondent to repurchase the land did not confer on the respondent any interest in the land; she only acquired a contractual right; the legal position is similar to that which arose in *Simpson* v. *Connolly*[5] where there was an agreement to discharge a debt conditional on transfer of the land. The respondent's right is governed by the law relating to contracts and the parties have chosen to make time of the essence of the contract; a term not prohibited by law. After the 31st December, 1950, the respondent's right became extinct."

This is a clear case of "jual janji" insofar as the land is concerned and whether or not the plaintiff's contractual right to re-purchase the land could still be exercised after the expiry of the 8 months period would depend on whether time was of the essence of the contract or not. This would, of course, depend on the intention of the parties. Section 56 sub-section (1) of our Contracts (Malay States) Ordinance No. 14/50 is the same as section 55 of the Indian Contract Act 1872 and Lord Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dunjibhai*[6] after referring to the Indian section said:

"Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time." ..."Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time limit specified." ..."But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention

exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract."

In *S. Ayadurai* v. *Lim Hye*[7] it was held among other things that

"although a determinable date ostensibly obligatory was fixed for completion, the nature of the property is such that time for payment of the balance of the purchase price cannot be deemed to be of the essence of the contract;"

As I have found earlier, the transaction in this case was in fact a loan transaction and it is obvious that as long as he gets his $40 interest monthly the defendant's father was not anxious that the loan be repaid within the period of 8 months and from the facts that he had continued to receive the $40 p.m. till October 1965, long after the expiry of that period and that the memorandum of transfer in respect of the land which was executed on July 14, 1959 was not registered by him in the Registry until March 24, 1962 I am satisfied that time was not of the essence of the contract.

In *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.*[8] the plaintiff claimed specific performance of an agreement of sale of a rubber estate entered into between him and the defendants or in the alternative for damages, or rescission of the contract. Under the agreement time had been made the essence of the contract, but at the request of the plaintiff the defendants had consented to extension of time for completion on six separate occasions. Eventually the defendants through their solicitors wrote to the plaintiffs on November 15, 1967, insisting that the purchase be completed on the same day. As completion was not made on that day, they wrote to the plaintiff to say that the agreement was terminated. Subsequently the plaintiff offered to complete the contract but the defendants refused, taking the view that the contract was at an end. It was held among other things that:

"(1) once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give reasonable notice of their intention to abandon the contract if the balance is not paid;"

Thus in this case even if time was originally of the essence of the contract it had been allowed to pass and the conduct of the parties clearly showed that it was no longer so.

The plaintiff is therefore entitled to repurchase the land on payment of the sum of money lawfully due to the defendant.

Although a memorandum of transfer cannot be considered as anything else but an absolute sale in respect of the land the same does not apply to the purported sale of with an option to re-purchase moveable property.

In *Wok binte Hussein* v. *Harchand Singh*[9] the plaintiff had executed two documents, one purporting to assign her two movable houses to the defendant and the other giving the plaintiff the right to repurchase the two houses by instalments. The plaintiff's case was that the documents together amounted to a bill of sale and that since they were not in the prescribed form and were not registered the transaction was wholly void. To this counsel for the defendant submitted that the first document amounted to an absolute assignment and that the second document was an agreement to repurchase by instalments, and that the court cannot go behind these documents which speak for themselves. It was held that:

"following the judgment of Lord Esher, M.R., in *Madell* v. *Thomas & Co.*[10] the main object of the Bill of Sale Enactment is to protect borrowers against lenders and if documents appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, this court will go through the documents in order to arrive at the truth.

From the evidence adduced as to the circumstances of the transaction, the two documents amount to a bill of sale."

Under section 3 of the Bills of Sale Ordinance No. 30 of 1950

" 'bill of sale' also includes, as regards any personal chattels which may be seized or taken thereunder, every attornment, instrument or agreement whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, but does not include or extend to any mortgage or charge of any estate or interest in any land which the mortgagee or chargee being in possession demises to the mortgagor or chargor as his tenant at a fair and reasonable rent;"

I am satisfied that the two documents in this case, P1 and the agreement, together amounted to a bill of sale and since they have not complied with the provisions of the said Ordinance they are void under section 4 of the said Ordinance. As such the plaintiff would be entitled to prayers 2 and 4 and part of prayer 5 in respect of the premises.

In the event I give judgment for the plaintiff as prayed in prayer 5 in respect of the land subject to the payment within one month from to-day by the plaintiff to the defendant of $1,000 plus $20 per month from October 1965 to May 1967 (*i.e.* $400) making a total of $1,400 and in prayers 2, 4 and 5 in respect of the premises. I also order the defendant to pay the plaintiff's costs.

The defendant's counterclaim is dismissed with costs.

Judgment for the plaintiff.

Solicitors: *Wilson & Co.; Dato' Bijaya & Co.*

ABU BAKAR BIN NAZMEER v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) July 2, 1970]

[Penang — Criminal Appeal No. 16 of 1970]

Customs and Excise — Attempted fraudulent evasion of customs duty — Failing to declare dutiable goods — Fraudulent intent — Customs Ordinance, 1952, ss. 97 and 99.

Evidence — Statement to customs officers — Whether admissible without caution.